Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-1248

In The
Supreme Court of The United States
October Term 1997

CALLAWAY COUNTY
AMBULANCE DISTRICT
Petitioner,

v.

CHRISTINA PEEPER
Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. PATTON*
ROSE M. HEIM
16 North Eighth Street
Post Office Box 7537
Columbia, Missouri 65205
(573) 499-9150

Counsel for Respondent
**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

QUESTIONS PRESENTED

1. Whether association rights and equal treatment rights may be the basis for an appellate decision where the civil rights claim was filed under 42 U.S.C § 1983 of First Amendment and Fourteenth Amendment violations, the claimant primarily argued theories of first amendment free speech and prior restraint, and the relevant facts fully support the appellate court decision?

2. Whether the District's Resolution should be sustained if it can be shown to have a "rational basis" or whether it must undergo a more rigid standard of review?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATUTE INVOLVED 1
STATEMENT OF THE CASE 1
A. Proceedings Below 1
B. Factual Background 2
REASONS FOR DENYING THE PETITION 6
I. Appellate Court Discretion 6
(a) Claim Properly Before Court 7
(i) Freedom of Association Inseparable Aspect of First and Fourteenth Amendment 7
(ii) Petitioner Misstates The Record Below About Respondent's Claims and Arguments 7
(b) Justice Dictated The Exception Apply 10
II. Decision Not Erroneous 12
CONCLUSION 16
APPENDICES
A. Constitutional and Statutory Provisions A-1
B. Respondent's Complaint B-2

TABLE OF AUTHORITIES

Cases: Page

Bullock v. Carter,
405 US 134, 31 L Ed 2d 92, 92 S Ct 849 (1972). 12

Families Achieving Independence and Respect v. Nebraska Department of Social Services,
111 F.3d 1408 (1997). 7

Griswold v Connecticut,
381 US 479 14 L Ed 2d 510, 85 S Ct 1678 (1965). . . 7

Hormel V. Helvering,
312 U S 552, 85 L Ed 2d 1037, 312 S Ct 719 (1941). . 11

Lebron v. National R. Passenger Corp.,
513 US 374, 130 L.Ed 2, 115 S Ct 961 (1995). 8

N.A.A.C.P. v. Alabama,
357 US 449, 460, 2 L Ed 2d 1488,1498,
78 S Ct 1163 (1958). 7

Republican Party of Arkansas v. Faulkner County,
49 F.3d 1289 (8th Cir. 1994). 7

Singleton v. Wulff,
428 US 106, 49 L Ed 2d 826,
96 S CT 2868 (1976). 6, 10

Turner v City of Memphis,
369 U S 350, 7 L Ed 2d 762, 82 S Ct 805 (1962). . . . 10

United States v Olano,
507 US 725, 732-37 (1993). 6

U.S. Nat. Bank of Ore. v. Ins. Agents,
508 US 439, 124 L Ed 2d 402, 113 S Ct 2173 (1993). 7

Constitution and Statutes:

U.S. Constitution, Amendment I (1791). . . . . *Passim*

U.S. Constitution, Amend. XIV,

Sec. 1 (1868). . . . . *Passim*

42 U.S.C. § 1983 (1994). 1,8

STATUTES INVOLVED

The following statutory provision is involved in this case but not listed by Petitioner. The constitutional and statutory provisions listed by Petitioner are not repeated here.

42 U.S.C. § 1983 (1994).

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

Federal jurisdiction in the district court is based on Respondent's claim under 42 U.S.C § 1983 of violation of rights under the First and Fourteenth Amendments to the U.S. Constitution. (R. Apdx. B-3). The district court found the Callaway County Ambulance District's Resolution was "content-neutral," "narrowly tailored to serve significant governmental interests" with "ample alternative channels of communication, . . . justifiable as a reasonable time, place, and manner restriction," and denied all relief. (Pet.Apdx B-22,23,25). Respondent appealed. The 8th Circuit Court of Appeals reversed finding the Resolution void on its face. (Pet. Apdx A-1,-15).

Respondent disagrees with Petitioner's statement as a fact that "the only federal constitutional right alleged by Respondent to have been abridged by Resolution No. 2" was her "right to freedom of speech under the first amendment."

(Pet. at p.7). Respondent stated her claims as violations of her ". . . rights under the First and Fourteenth Amendments to the U.S. Constitution. . ." (R.Apdx B-3). Respondent prayed for relief ". . . from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes . . ." (R. Apdx. B-7). Petitioner was on notice from the very beginning that Respondent's claims were founded on the First and Fourteenth Amendments.

B. FACTUAL BACKGROUND

Respondent adopts the facts set forth by the 8th Circuit Appellate Court which accurately and concisely states the relevant facts. (Pet.Apdx A-2 through A-7).

Respondent disagrees with Petitioner's rendition of the factual background. Petitioner misstates the facts as follows:

> * * * "During the May 28, 1996 meeting, there was an **extended discussion** concerning Respondent's **presence during certain closed sessions** of the ambulance district's board meetings." (Pet. at p. 5). (emphasis added)

At the meeting, Petitioner read a prepared revised resolution substantially excluding Respondent from discussing or voting on any matter touching on employees, without limit as what employee or what type of board meeting. (Pet. Apdx E-38). Respondent's attorney objected to the whole resolution as over broad and unnecessary. Petitioner's

characterization of the facts leaves a false impression that the Resolution applied only in a limited manner to some closed sessions. On its face, the Resolution is not so limited to avoid constitutional violations.

> "The Respondent **actively participated** at the April 23, 1996 meeting. * * * Respondent **actively participated** at the May 28, 1996 meeting. * * *" (Pet. at p 5).

Petitioner prevented Respondent from "actively participat[ing]" at meetings prior to trial, permitting only a severely limited participation. (Tr. 6-10; 12-16).

> * * * "The Respondent was **not entirely precluded** from participating during a **June 11 1996 meeting** of the ambulance district she attended." (Pet. at p.6).

The June 11, 1996 meeting was a fourteen minute special meeting where the only item discussed was repair of an ambulance damaged in an auto accident. (Jt.Apdx p. 150). Respondent fully participated without being excluded.

> "**The [employee law]suit was was (sic) filed thereafter and Respondent's husband is a plaintiff therein.** * * * The Missouri State Council of Firefighters sought to include Respondent's husband in the bargaining unit and **he was subsequently included in the bargaining unit.**" (Pet. at p.6).

At trial, the employee lawsuit about unpaid wages had not been filed; Respondent's husband was not a plaintiff; nor was he a member of the union because it had not yet been

formed. These are not facts supported by the record.

> "Respondent's interpretation of the Missouri conflict of interest law is such that she deems it prohibits her from discussing **only those matters that specifically address her husband by name. Given the opportunity, Respondent will attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization, litigation by her husband against the ambulance district, and determination of hours worked by employees (including her husband)**. (Pet. at p 6).

Petitioner misstates Respondent's testimony about her understanding of the conflict of interest law. Her testimony indicates she knew she could not "use or disclose confidential information that would be of special monetary benefit to [her] or [her] husband, or do something that would be of special monetary benefit to [herself] or [her] husband," (Tr. p. 17) or, "be present during discussions about litigation where she or her husband were parties." (Tr. p. 21). Respondent never stated she believed the conflict of interest only applied to matters that address her husband by name.

Petitioner states as a foregone conclusion Respondent will violate the conflict of interest law. The evidence does not support Petitioner's conclusory statement. The trial record shows Respondent never indicated an intent to violate

the conflict of interest law, much less to actually engage in a violation. (Tr.p. 17, 21-30). The record does not demonstrate one concrete instance in which Respondent attended, participated in or voted on matters of special monetary benefit affecting her and her husband financially, whether about the union organization, litigation by her or her husband against the district, or hours worked by employees including her husband. (Tr. p. 50, 58). At the time of trial, Respondent had attended three regular and one special meeting, yet Petitioner cannot point to any violation of the conflict of interest law by Respondent. On the other hand, Petitioner admitted that it allowed its director to attend a closed confidential board meeting on the union organization issue when his wife is a paramedic employee of the district, may be included within the bargaining unit, and did not, by resolution or otherwise, prohibit his attendance. (Tr. p. 60).

REASONS FOR DENYING THE PETITION

The general rule that "courts of appeal will not consider issues not raised below," argued by Petitioner, does not apply for two reasons. First, the Eighth Circuit Court of Appeals has discretion to render a decision on claims properly before it based on the applicable established law relevant to the facts regardless of the legal arguments offered by the parties. Secondly, this case falls squarely within the exception, where appellate courts have discretion in exceptional cases to reach new issues in order to render justice.

A. APPELLATE COURT DISCRETION.

Federal appellate courts retain the "independent power to identify and apply the proper construction of governing law" to claims, regardless of either parties' legal theories. **U.S. Nat. Bank of Ore. v. Ins. Agents**, 508 US 439, 446, 124 L Ed 2d 402, 413, 113 S Ct 2173 (1993). The matter of what questions an appeals court may take up and consider is left primarily to the discretion of the courts of appeals. **Singleton v. Wulff**, 428 US 106,121, 49 L Ed 2d 826, 837, 96 S CT 2868 (1976). This Court has recently stated the perimeters within which an appellate court operates to correct lower court errors. **United States v Olano**, 507 US 725, 732-37 (1993). Petitioner does not argue here that this court should revisit **Olano**, but that this Court should supervise the 8th Circuit Appeals Court in its application of principles already well established. The 8th

Circuit is well aware of review principles applicable to civil rights claims. **Families Achieving Independence and Respect v Nebraska Department of Social Services**, 111 F.3d 1408, 1410 (1997).

(a) CLAIM PROPERLY BEFORE COURT.

(i) FREEDOM OF ASSOCIATION INSEPARABLE ASPECT OF FIRST AND FOURTEENTH AMENDMENT.

It is well beyond debate that freedom of association is a close nexus to freedom of speech and "is an inseparable aspect of the `liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." **N.A.A.C.P. v. Alabama**, 357 US 449, 460, 2 L Ed 2d 1488,1498, 78 S Ct 1163 (1958); **Republican Party of Arkansas v. Faulkner County**, 49 F.3d 1289, 1292 (8th Cir. 1994). Freedom of association is a peripheral First Amendment right not expressly included in the First Amendment. The existence of association as a form of expression necessary to make the express guarantees fully meaningful is settled law. **Griswold v. Connecticut**, 381 US 479, 483, 14 L Ed 2d 510, 514, 85 S Ct 1678 (1965).

(ii) PETITIONER MISSTATES THE RECORD ABOUT RESPONDENT'S CLAIMS AND ARGUMENTS BEFORE THE LOWER COURTS.

Petitioner claims the 8th Circuit based its opinion on claims not before the court at all. This is not a fair or

correct statement. In her complaint, Respondent invoked federal jurisdiction under 42 USC § 1983 based on violations of her civil rights protected by the First and Fourteenth Amendments to the U.S. Constitution. (R. Apdx B-3). Respondent requested relief "from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes on matters pertaining to Defendant's employees . . ." (R. Apdx B-7). From the very beginning the claim was before both lower courts.

The right of association is included within the Respondent's broader claim of Freedom of Speech expression rights guaranteed by the Fourteenth Amendment due process equal protection. The 8th Circuit merely fine tuned its holding to a narrower aspect of the Respondents initial and continuing claim that her First and Fourteenth Amendment rights were violated. Association and equal protection rights were not new claims within the preclusion rule, but a different aspect or argument to support what was always Respondent's consistent claim; that Petitioner violated Respondent's civil rights protected by the First and Fourteenth Amendments. **Lebron v. National R. Passenger Corp.**, 513 US 374, 130 L.Ed 2d 902,909-10, 115 S Ct 961 (1995) (appellate discretionary review of dispositive governmental entity issue expressly disavowed in both lower courts and first argued in brief before Supreme Court). The Complaint stated the claims clearly and were

properly before the lower courts. (K.Apdx B-3,7).

In her trial brief, Respondent relied most heavily on arguing First Amendment free speech and the doctrine of prior restraint, but prayed for relief on her "constitutional rights of free speech and association." (R.Trial Brief,p 8). Before the appeals court, Respondent summarized her position as:

> ". . . that appellee's resolution prohibiting her from discussing and voting upon virtually all matters concerning district employees, despite her being a co-equal member of the board of directors, constitutes a continuing violation of her First Amendment rights of speech and expression as protected by the Fourteenth Amendment of the U.S. Constitution far in excess of any legitimate justification under Missouri conflict of interest statutes." (Appellant's Opening Brief, at p.1).

Throughout her brief, Respondent argued she was singled out for different treatment from her co-equal board members, yet the other directors were not subject to the Resolution's blanket prohibitions about many employee matters unrelated to Respondent or her husband, implicating Fourteenth Amendment equal protection upon which the appellate court based its holding. (Appellant's Opening Brief, p. 30-36; P. Apdx A-7).

Petitioner did not address Respondent's argument she was being treated differently from her co-directors in broad

areas not related to her or her husband's employment and not related to any financial gain, arguing instead the Resolution was adopted for "compelling reasons" and was "narrowly drawn." (See generally, Brief of Appellee). Petitioner's choice of legal argument does not prevent the appeals court from addressing the claim. Petitioner had full opportunity to present evidence at the bench trial and argue its legal theories before both lower courts. The appellate court acted well within its prudential discretion. The Writ should be denied.

(b) JUSTICE DICTATED THE EXCEPTION APPLY.

In addition, but not because the claim is precluded, this case falls within the exception, where appellate courts have discretion in exceptional cases to reach new issues in order to render justice. **Singleton v. Wolf**, 428 US 106, 121, 96 S Ct 2868, 2877-78; 49 L.Ed 2d 826 (1976) (where "proper resolution beyond any doubt" or "injustice might otherwise result"). One need only read the Resolution, and the 8th Circuit opinion in contrast to the District court opinion to realize that the proper outcome is not in doubt. The Resolution is simply not reasonable in the many areas as stated by the 8th Circuit. Without question, injustice would result if a void and unconstitutional board resolution be allowed to operate against Respondent. **Turner v. City of Memphis**, 369 U S 350, 353, 7 L Ed 2d 762, 764-5, 82 S Ct 805 (1962) (relief against discrimination clear under

prior decisions and undisputed facts; Tenn. Statutes inconsistent with Fourteenth Amendment); see also, **Hormel v. Helvering**, 312 U S 552, 557, 85 L Ed 2d 1037, 1041 (1941) (procedural rules do not defeat justice).

Clearly, justice demands relief from a void and discriminatory district board resolution. This case falls outside the general rule because the claim was properly before both lower courts, but, additionally, within the exception because injustice would otherwise result. After reading the condensed arguments in the Petition and Response, the opinions below and the Resolution, this court can reasonably conclude there is little doubt as to how this case will be decided. The Petition for Writ of Certiorari should be denied because the 8th Circuit rendered justice.

II. THE EIGHTH CIRCUIT DECISION NOT ERRONEOUS.

Petitioner argues that the standard of review should be "strict scrutiny" not the "reasonable basis" test used by the 8th Circuit. (Pet. p. 27). This is not a reasonable argument. If Petitioner could not show the 8th Circuit why it is not necessary to relate the prohibited matters to the state interests cited by the Board, it is highly unlikely that Petitioner could convince this Court under a higher degree of scrutiny that the Resolution need not be "narrowly tailored" or rationally related. The lower "reasonable basis" standard is to Petitioner's advantage and should not be grounds for granting a Writ of Certiorari.

Regardless of the level of scrutiny, Petitioner cannot achieve its objectives by totally arbitrary means. The criterion for different treatment must bear some relevance to the object of the resolution. **Bullock v. Carter**, 405 US 134, 145, 31 L Ed 2d 92, 101, 92 S Ct 849 (1972). Petitioner was unable to show how participating in discussions or voting on "legal actions, causes of action or litigation between the District and its employees" without a requirement that the topic be related to Respondent's husband's employment is relevant to conflict of interest law, or preventing the appearance of corruption. Petitioner was thoroughly questioned during oral argument before the 8th Circuit panel about the "narrowly tailored" and "reasonably related" areas, but did not persuade the appellate court

judges to accept his viewpoint.

Petitioner argues for the first time here that the district has a compelling interest in "maintaining the propriety and fairness of financial matters affecting its employees" and the Respondent's mere presence "creates the appearance of unfairness to other ambulance district employees and among the general public." (Pet. p. 19). "Fairness of financial matters" is not stated as a concern in the Resolution. No evidence about this state interest was offered at trial, yet Petitioner argues this is a compelling interest that has been adjudicated. (Pet. p. 19). This is not a persuasive argument. Following this reasoning, no board member could have any relationship with an employee, whether a familial, social, or business interest, without creating an objectionable atmosphere of unfairness by their mere presence, yet other board members would not be subject to this Resolution.

The 8th Circuit did find the Petitioner had some reasonable state interests "to prevent the misappropriation of information for personal gain, to prevent the appearance of impropriety and to promote the free flow of ideas among members of the board;" but rejected the Petitioner's concerns about avoiding accessory criminal liability. (P.Apdx p A-12). However, the 8th Circuit could not, under the reasonable basis test, find that the Resolution was narrowly drawn to achieve those stated interests. Nor could the court find that many matters were rationally related to

the stated purposes. (Pet.Apdx p A-13 - A-15).

The Resolution is not "narrowly tailored" because it fails to limit its burden to matters about Respondent or her husband's employment. For example, "the Resolution prevents Respondent from participating in discussions of hiring or firing employees or addressing testing and examination materials without regard to whether Respondent's husband is associated with the matters." (Pet. Apdx A-13). The Resolution prohibited Respondent from receiving or discussing information about the performance or merit of individual employees without regard to whether the information relates to Respondent's husband's employment. (Pet. Apdx E-38). The Resolution also prohibited Respondent from discussing or voting upon matters about individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, alcoholism or drug dependency diagnosis or treatment. (Pet. Apdx E-38). Unless discussing or voting upon those matters involved her husband, Respondent would have no means to obtain financial gain for herself or her husband. Unless those areas pertained to her husband, Respondent was in no different posture than her co-equal board members.

Petitioner argues the 8th Circuit should have focused on "whether the district's goals are furthered by Resolution No. 2, and not whether each specific subsection of

Resolution No. 2 precisely, and without deviation therefrom, promotes a corresponding explicit goal or specific subsection of the conflict of interest law." (Pet. p. 28). Petitioner misunderstands the concept that the Constitution is a limit on governmental actions, not a grant of power to do whatever is necessary to further its "goals."

The broad prohibitions not directly or indirectly related to Respondent's husband are not "narrowly tailored." Because those "vast portions of the May resolution that go beyond matters that could not lead or appear to lead to corrupt behavior by Peeper," are not "narrowly tailored" nor "rationally related," the Resolution infringes Respondent's First and Fourteenth Amendment rights. (Pet. Apdx A-14).

Petitioner simply does not agree with the result and now wants to reargue its original legal theory here by claiming the decision is erroneous. The Writ should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN L. PATTON*
ROSE M. HEIM
16 North Eighth Street
Post Office Box 7537
Columbia, MO
(573) 499-9150
FAX: (573) 442-9804

Counsel for Respondent
**Counsel of Record*

APPENDIX A

STATUTES

42 U. S. C. SECTION 1983 (1994)

42 U.S.C. SECTION 1983 (1994).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHRISTINA PEEPER,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 96 4228-CV-C-2
	)	
CALLAWAY COUNTY	)	
AMBULANCE DISTRICT,	)	
a political subdivision	)	
of the State of Missouri,	)	
Defendant.	)	

COMPLAINT

COUNT I

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF UNDER 42 USC § 1983

The plaintiff, by counsel, for her cause of action against defendant states the following:

1. Plaintiff is a citizen and resident of Williamsburg, Missouri, located in Callaway County, within

the state of Missouri.

2. Defendant is a body corporate and political subdivision of the State of Missouri, organized pursuant to the provisions of §§190.005 - 190.085 of the Revised Statutes of Missouri, and is capable of bringing suit and being sued as such pursuant to section 190.010 RSMo.

3 This Court has jurisdiction to hear and determine this Complaint pursuant to 42 USC § 1983 and 42 USC § 1988, in that the conduct of Defendant complained of herein violated and continues to violate Plaintiff's rights under the First and Fourteenth Amendments to the U.S. Constitution as more specifically enumerated in this Complaint. Further, Plaintiff respectfully invokes this Court's jurisdiction pursuant to rule 18(A) F.R.C.P. and 28 U.S. C § 1367 to hear and adjudicate ancillary's state law claims set forth in Count II of this Complaint.

4. Venue lies in this court and is proper because Plaintiff resides in the geographic boundaries of the district and division where this suit is filed and Defendant is organized and is operated within the same geographic boundaries.

5. Defendant is governed by a six-member board of directors whose powers are defined by §§ 190.055-190.060 RSMo.

6. On or about April 2, 1996, Plaintiff was elected to Defendant's board of directors by write-in ballot, and shortly thereafter were [sic] duly sworn into office.

7. At the time of plaintiff's election and taking office, Defendant's board of director consisted of Jean Benzene, Kathy Courtright, Steve Anderson, Cindy Smola and John Wheeler as well as the plaintiff. Under the ambulance district law as above cited, no distinctions are made between the power of authority of members of the Board of Directors.

8. On April 23, 1996, Plaintiff attended her first meeting of the board of directors. At that meeting, after conduct of routine business and election of officers, the board of directors, through vote of Steve Anderson, John Wheeler, Cathy Courtright and Cynthia Smola, passed a resolution pertaining to Plaintiff, the text of which is set forth in Exhibit #1, attached hereto and incorporated herein by reference.

9. The substance of the resolution shown on Exhibit #1 was that Plaintiff, due to her marriage to a person who is employed as an emergency medical technician with the Defendant district, was barred from all meaningful participation and discussion involving the business of the [sic] to be conducted by the board of directors and was barred from voting upon substantive matters of the board of directors, all as described in said resolution. Prior to passage of said resolution, Plaintiff objected to the resolution as over broad and unnecessary.

10. Plaintiff has never violated any provision of § 105.452 RSMo., being a section of the state conflict of

interest laws, nor has Plaintiff any intent to violate such statute. Notwithstanding the foregoing, Plaintiff was barred from active discussion concerning issues of public concern in her capacity as a member of the board of directors at the April 23, 1996, meeting of the board of directors, and from voting on all matters except the most mundane of business. Thereafter at the next regularly scheduled meeting of the Board of Directors held on May 28, 1996, Plaintiff attended and once again made objection to her being prohibited from participating in discussions on matters of pubic concern to which she was entitled to participate as a member of the board of directors and from voting thereon. At this meeting and after lengthy discussion, a majority of the members of the board of directors then present by majority vote passed a second resolution shown in Exhibit #2 and attached hereto and incorporated herein by reference. The substance of this resolution was to permit Plaintiff to participate in all discussions and votes of board of director's business, except those pertaining to employees. Plaintiff likewise objected to the necessity of this resolution.

11. The actions of Defendant through its board of directors in passage and enforcement of Exhibits #1 and #2, constitute a violation of Plaintiff's right to the free exercise of speech and expression protected under the First Amendment of the U.S. Constitution made applicable to political subdivisions of the State of Missouri through the Fourteenth Amendment of the U.S. Constitution.

12. The passage and enforcement by Defendant of Exhibits #1 and #2 against Plaintiff constitutes a prior restraint on Plaintiff's free exercise of her right of speech and expression and to cast a vote in her capacity as a duly elected member of the board of directors of Defendant because no judicial determination has been made that Plaintiff's exercise of her free speech rights and voting rights as a member of the board of directors do not qualify for protection under the First and Fourteenth Amendments to the U.S. Constitution.

13. Plaintiff is suffering irreparable harm from being deprived by Defendant to the free exercise of speech and expression by participating in discussion amongst the board of directors on issues of public concern pertaining to the governance, operation and management of Defendant in relation to its employees, and from being prohibited from voting on matters thereon.

14. Plaintiff has no adequate remedy at law and Defendant should be enjoined from enforcement of Exhibit #2 and passage of any further orders, resolutions or ordinances restraining Plaintiff's free exercise of her rights of speech and expression in discussing matters of public concern as a member of the board of directors and from exercising her right to vote thereon.

WHEREFORE, Plaintiff prays the Court to issue a preliminary and permanent injunction prohibiting Defendant from enforcing the resolutions contained in Exhibits #1 and

#2, and from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes on matters pertaining to defendant's employees, for an order awarding her attorney fees, litigation expenses and costs as permitted by law, and for such orders of relief as the Court deems just and proper.

COUNT II

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO CHAPTER 536 RSMO

The plaintiff by counsel for her cause of action under Count II of this complaint states the following:

1. The plaintiff realleges and incorporates by reference all allegations made in Count I hereof as if fully set forth verbatim.

2. In addition to and not in lieu of the relief sought under Count I of this Complaint, plaintiff seeks declaratory and injunctive relief pursuant to §§ 536.140-.150 RSMo as authorized under by [sic] rule 18 (A) F.R.C.P. and 28 USC § 1367.

3. The court should declare the adaption [sic] of Exhibits 1 and 2 unlawful and enjoin enforcement thereof for the following reasons:

a.) The adaption [sic] and enforcement of Exhibits 1 and 2 by defendant against plaintiff is unconstitutional in application because it violates the

First and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Missouri Constitution 1945.

b.) The adaption [sic] and enforcement of Exhibits 1 and 2 by Defendant against Plaintiff is in excess of defendant's statutory authority and jurisdiction in that no provision of §§ 190.005-.190.085 RSMo, the Ambulance District Law, authorizes or empowers the board of directors of an Ambulance District to place restraints upon board of director member speech or voting rights to enforce or prevent violation of § 105.454 RSMo, and by virtue of § 105.472 RSMo. only the Attorney General of the state of Missouri is empowered to investigate and prosecute complaints of violations of the Missouri Conflict of Interest law.

c.) The adaption [sic] and enforcement of Exhibits 1 & 2 by Defendant against Plaintiff was arbitrary, capricious, unreasonable, involved an abuse of discretion, was made without lawful procedure, and was without authority of law because Plaintiff has not violated any provision, has no intent to violate such law and the members of the board of directors voting to enact Exhibits 1 & 2 had and have no factual cause or legal basis to do so with the result of restraining Plaintiff's rights to participate in discussions at meetings and exercising her voting

rights.

4. Plaintiff is without adequate remedy at law and suffers irreparable harm due to Defendant's adaption [sic] and enforcement of Exhibits 1 & 2 and the Court should declare said resolutions unlawful and enter preliminary and permanent injunctive relief prohibiting Defendant through its governing body from enforcing Exhibit #2 and passage of any ordinance, order, or resolution, restraining defendants [sic] participation in discussions and exercising her right to vote as a member of Defendant's Board of Directors.

WHEREFORE, Plaintiff prays the Court to declare Exhibits 1 & 2 unlawful and unenforceable, to issue a preliminary and permanent injunction prohibiting Defendant from enforcing the resolutions contained in Exhibits #1 and #2, to award Plaintiff her attorney fees and costs, and to enter such other orders and relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

s/s John L. Patton
Missouri Bar No: 30117
16 North Eighth Street
P.O. Box 7537
Columbia, MO 65265
(573)499-9150

Attorney for Plaintiff

EXHIBIT 1, **RESOLUTION** dated April 23, 1996 is not set out here because it was not considered by either

lower court, thus is not involved in this case.

Exhibit 2, **RESOLUTION** dated May 28, 1996, is set forth in Petition for Writ of Certiorari, Appendix E p 36-39.